

In re) Fair Hearing No. 10,092
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Appeal of)

The petitioner appeals the decision of the Department of Social and Rehabilitation Services denying her application for a family day care registration certificate based upon the Department's belief that a person with a founded report of sexual abuse resides in her home.

1. In 1985, the petitioner's foster care license and day care home registration certificate were revoked when the Department made a statutory "finding" that the petitioner's teen-age son had sexually abused two foster children who had been in the petitioner's care. The petitioner did not challenge the Department's action at that time.

2. In early 1990, the Department received reports that the petitioner was caring for several children for more than two families at her home even though she was neither registered nor licensed. Pursuant to this report, the Chief of the Licensing Division visited the petitioner's home and talked with her.

3. The Licensing Chief was told by the petitioner that

she only cared for one child in her home full-time but was on call to baby-sit children from ten to eighteen different families as needed. None of the persons in those families is related to her. She added that no more than five children were ever in her care at one time and frequently she had only one. She also admitted that her son who had been the subject of the "finding" still resided with her.

4. The petitioner was advised by the Licensing Chief that her situation required her to be a registered day care provider and that he would seek an injunction against her if she did not apply for one. He also advised her that she could seek an expungement of the 1985 "finding" against her son by requesting a hearing before the Human Services Board.

5. Although she did not agree that she needed to be registered, the petitioner nevertheless applied for a family day care home registration certificate on January 27, 1990.

She also requested an expungement hearing on the 1985 finding. The Department agreed to defer a decision on her registration application and to refrain from any further legal action until the Human Services Board made a decision on the expungement request.

6. In July of 1990, after a hearing on the merits, the Board affirmed the Department's 1985 finding of sexual abuse against the petitioner's son and denied the petitioner's request for expungement. See Fair Hearing No. 9637.

7. After confirming with the petitioner that her son

still resided in her home, the Department denied her family day care registration certificate on August 21, 1991, in a letter from the Licensing Chief. A copy of that letter is attached hereto as Exhibit 1. The petitioner appealed that denial on September 24, 1990. The Department's decision was reviewed and concurred with by the Commissioner on January 24, 1991 prior to the hearing.

8. At hearing, the petitioner admitted that her now twenty-one year old son continues to reside with her and has not been involved in any kind of counseling for sex offenders. He works in a doughnut shop from 5:30 or 6:00 a.m. and usually does not return until 7 p.m. During the last year he has seldom been home when day care children were in the home but the petitioner did specifically recall that on a few occasions he did spend several hours at home when the children were there. The petitioner was also there at all times when her son was home.

9. At hearing, the Licensing Chief testified that as long as her son resided in her home, the Department took the position that the petitioner was ineligible to receive a day care registration certificate. The fact that the petitioner's son was usually out of the house during the day was not felt to remove the potential harm. In addition, the Licensing Chief stated that he did not believe that the Department had the discretion to suspend or make exceptions to the "residing with" rule. When such exceptions were made in the past pursuant to a more relaxed former policy, the

Department found itself unable to monitor the situation in day care homes which are supposed to be "self-policing." In at least one case, sexual abuse of children reoccurred in a home which had been given a waiver.

ORDER

The Department's decision denying a day care home registration certificate to the petitioner is affirmed.

REASONS

The petitioner disagrees with the denial of her application based on her son's residence in her home. She maintains that his habitual absence from his home due to his daily employment is sufficient to protect the children in the petitioner's care from any potential sexual abuse and that her application should have been granted notwithstanding any Department regulations which provide otherwise.

33 V.S.A. . 306(b)(1) authorizes the Commissioner of the Department of Social and Rehabilitation Services in general to "issue regulations governing application for, and issuance, revocation, term and renewal of licenses and registration. In the regulations he may prescribe standards and conditions to be met. . ."

The statute further provides that:

Regulations pertaining to day care facilities and family day care homes shall be designed to insure that children in day care facilities and family day care homes are provided with wholesome growth and educational experiences, and are not subjected to neglect, mistreatment or immoral surroundings.

33 V.S.A. . 3502(d)

In addition to this authority to make rules governing applications, the statute specifically requires:

Before a family day care home registration¹ is granted, the department shall make inquiry and investigation. Inquiry and investigation may include a visit to and inspection of the premises for which the registration is requested. Further inquiry and investigation may be made as the Commissioner may direct.

33 V.S.A. . 306(b)(4)

Pursuant to its regulation making authority, SRS has adopted the following regulation:

Section I Staff

. . .

(5) The following persons may not operate, reside at, be employed at or be present at a Family Day Care Home.

. . .

b. persons who have had a report of abuse or neglect founded against them.

Section V - Relationship Between Registrant and Division of Licensing and Regulation:

. . .

(4) The Division may deny the issuance of a Registration Certificate if it has found that the person who has submitted the Registration Statement has not complied with these regulations or has demonstrated behavior which indicates an inability to care adequately for children.

The Department has relied upon the violation of the regulation at Section I, Paragraph 5(b) above as grounds for the denial of the petitioner's application. It is the Department's belief that the nature of the violation is so serious as to justify an unequivocal rejection of the day

care registration application. The Department takes the position that the violation per se places children at risk of harm and that promises with regard to the safe keeping of children exposed to this type of danger are, in its experience, always insufficient, unworkable, and incapable of being monitored.

The burden is on the petitioner in an application for a registration certificate to prove facts showing both that she meets eligibility requirements and/or that even if she does not meet all requirements that the Department has abused its discretion in denying her application. Fair Hearing No. 7764, Human Services Board Rule No. 12. In the instant case, the operative facts are not disputed--namely that the petitioner's son had a substantiated finding of sexual abuse made against him and that he continues to reside in her home. It is also beyond dispute that the Department has adopted a regulation which specifically prohibits the residence of a sexual offender in a day care registered home. If the petitioner is to prevail in this matter, she must prove that the Department abused its discretion when it determined that the violation of its regulation should result in the denial of the certificate.

The Board has previously held that under 33 V.S.A. . 2852(c) and 33 V.S.A. . 2596(b)(3) now recodified as 33 V.S.A. . 3502 and 33 V.S.A. . 306, that although SRS has the authority to deny applications based on its regulations, such denials "must be limited to serious" violations of

regulations or laws which implicate neglect, mistreatment or immoral surroundings or risk of health, safety or the well-being of children. See Fair Hearings No. 6773, 7764.

However, the Department has a good deal of discretion in making that determination based upon its special expertise and is entitled to a presumption of the correctness and reasonableness of its actions. In re Johnson 145 Vt. 318 (1985), Huntington v. SRS, 139 Vt. 416 (1981). The Board has held that to overcome this presumption, the petitioner must show by clear and convincing evidence that the agency abused its discretion. Fair Hearing No. 7764.

The petitioner has fallen far short in her appeal of meeting this heavy burden. Although she has presented evidence that her son is usually working during the hours she cares for children, she has not demonstrated (and most probably cannot) that the children in her care will not again be abused by her son. As long as he lives in her home and has the right to return there whenever he wishes, he potentially has an opportunity to be with young children.² In addition, her son has never acknowledged his offenses or received any therapy as a sex offender, thereby creating further concern that these offenses might occur again.

Given the above facts, it cannot be found that the Department abused its discretion in this case. On the contrary, the evidence indicates that the violation in this case is indeed a serious one which could lead to the mistreatment of children and put their health, safety and

well-being at risk. As such, the Board affirms the decision of the Department to deny a day care home registration certificate to the petitioner so long as her adult son continues to reside in her home.

FOOTNOTES

¹This term is defined at 33 V.S.A. . 4902(3).

²At her hearing, the petitioner relied on some language in the Board's prior decision on the underlying founding indicating that it appeared her impediments to registration would be removed in the future because the evidence showed that her son would not be "interested in or involved in any way with her day care operation." However, the petitioner should note that those findings were specifically based upon her representation that her son would be moving out of her house. His failure to move out radically changes that assessment.

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